

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                             |   |                          |
|-----------------------------|---|--------------------------|
| IN RE:                      | § |                          |
|                             | § |                          |
| CALVIN L. HARRIS and DEBORA | § | CASE NO. 01-35471-RCM-13 |
| F. HARRIS,                  | § |                          |
|                             | § |                          |
| D E B T O R S.              | § |                          |

**MEMORANDUM OPINION AND ORDER**

Item Specialties, Inc., filed a secured proof of claim in the amount of \$37,647.87 against the Chapter 13 bankruptcy estate of Calvin and Debora Harris, the debtors. The claim is secured by a wrap mortgage on the Harris' principal residence. Item Specialities also objected to the Harris' Chapter 13 plan, unless the plan paid the pre-petition arrearage on the mortgage and the outstanding property taxes. The debtors objected to the claim. The court conducted an evidentiary hearing on the allowance of the claim on May 30, 2002.

The allowance of a claim against a bankruptcy estate constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. § § 157(b)(2)(B) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

The parties narrowed their dispute for resolution by the court to two issues: (1) the allowance of attorney's fees and expenses of \$3,412.55; and (2) the allowance of accountant's fees of \$450.

Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a prima facie case against the debtor's assets." In re Fidelity Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to rebut the claim. Id. Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. Id. Accordingly, Item Specialties, Inc.'s proof of claim as a secured claim is prima facie valid, unless the debtors produce evidence to rebut the presumption.

The parties agree that the value of the collateral exceeds the debt. The parties also agree that the debt is secured by the debtors' principal residence. The parties further agree that the debtors had been in default on the note prior to the filing of the bankruptcy petition. The debtors' Chapter 13 plan may not modify the rights of Item Specialities, Inc. 11 U.S.C. § 1322(b)(2). The deed of trust provides for the recovery of attorney's fees in the event of default. The note provides for

ten percent of the principal and interest outstanding as attorney's fees.

The debtors established that their agreement with Item Specialities does not provide for accountant's fees. Item Specialities originally retained the legal services of Jack Norman. Item Specialities then substituted the law firm of Quilling, Selander, Cummiskey, and Lownds, P.C., for Norman. The debtors established that the lawyers duplicated work related to the Chapter 13 case. Accordingly, the debtors have rebutted the prima facie validity of the claim for attorney's fees and accountant's fees. Therefore, Item Specialities must establish the entitlement and reasonableness of the fees by a preponderance of the evidence.

Texas law permits recovery of reasonable fees, which in this case applies to the work that was done pre-petition. Then, as an over-secured creditor, Item Specialities may recover in its claim "any reasonable fees, costs, or charges provided for under the agreement" of the parties. 11 U.S.C. § 506(b). The Bankruptcy Code permits recovery of "reasonable" fees and expenses. In re Hudson Shipbuilders, Inc., 794 F.2d 1051 (5th Cir. 1986). Counsel may perform services at the request of Item Specialities. Regardless of what Item Specialities and its counsel agreed to concerning payment for those services, the court must determine whether it is reasonable to charge the debtors, under the loan

agreement and the Bankruptcy Code, for those services. Brown v. Sullivan, 917 F.2d 189, 192 (5th Cir. 1990). The standard for reasonableness is a federal standard. In re Hudson Shipbuilders, Inc., 794 F.2d at 1056-1058.

To determine reasonableness, the court must consider several factors. Id. at 1058. The court must determine the nature and extent of the services rendered by counsel and the value of those services. In re First Colonial Corp. of America, 544 F.2d 1291, 1299-1300 (5th Cir. 1977), cert. denied, 431 U.S. 904 (1977). These two factors comprise the components for the lodestar calculation. Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The court may then adjust the compensation based on the Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), factors. Blanchard v. Bergeron, 489 U.S. 87, 91-92, 94-95 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Id.

Mark Gott, the principal of Item Specialities, testified that he is a retail salesman, not a banker. Item Specialities purchased the wrap note, secured by the deed of trust. The debtors were in default in the spring of 2001. Gott hired Norman. Norman submitted invoices for his services. The

invoices did not report Norman's hourly rate. Gott did not establish Norman's hourly rate. Norman did not testify. Gott paid Norman approximately \$2,400. Gott then substituted Quilling, Selander, et al. for Norman. Gott has paid Quilling, Selander, et al. \$475 and owes about \$1,000.

The court has reviewed Norman's invoices. The invoices describe the work performed by date, but do not specify the time spent on a matter. Under the lodestar analysis, time spent on a matter is an essential element in the determination of the reasonableness of the fees. The court must draw an inference of time spent based on the invoices, the testimony, the case file, and the totality of the circumstances, including the court's experience and knowledge.

As the debtors were in default, Norman prepared a demand letter, a notice of intent to accelerate the note, and then notices associated with a foreclosure procedure. Norman posted, served, and filed the foreclosure notices. Being routine legal matters, the work could not have taken more than 2 hours.

Norman negotiated with the debtors. His invoices report, however, various communications with Gott and then with the debtors. The court can infer that a total of 1 hour could be charged to the debtors as reasonably necessary to attempt to preserve the collateral through a consensual arrangement.

The debtors then filed their bankruptcy petition. Norman had to review their proposed plan and bankruptcy schedules, attend a meeting of creditors, and prepare a proof of claim. Again, these were routine Chapter 13 matters. The court infers 2 hours for that work. The court finds a total time of 5 hours as reasonably necessary to pursue collection and preserve the collateral. The court assumes an hourly rate for Norman of \$150. The record neither supports nor contains any basis for a higher hourly rate. The court, therefore, finds reasonable compensation for Norman of \$750.

John Paul Stanford of the Quilling, Selander, et al. firm performed services for Item Specialities in February, March, and April of 2002. Stanford also represented Item Specialities at the claim allowance hearing. The work that Stanford performed in February necessarily duplicates the work performed by Norman. The court could have disallowed Norman's work, and allowed Stanford's. But, both charges cannot be included in a claim against the debtors. In March, Stanford worked on a motion to lift stay that was never filed. He also reviewed the debtors' revised plan, and worked on the claim, including conversations with Norman. As the lift stay motion was not filed, it is not reasonable for Gott to include charges for that work in the proof of claim. Obtaining information from Norman, who already submitted invoices to Item Specialities, cannot be charged to the

debtors. The court, therefore, finds 1.2 hours of the work in March to be reasonably charged to the debtors, but not the other 1.2 hours. The April work of 0.6 hours related to refining the claim, which ultimately helped to narrow the parties' dispute. Stanford will necessarily have to charge at least 1 hour for the claim allowance hearing, and for the related plan confirmation work.

The court finds reasonable time of 2.8 hours. Stanford's hourly rate of \$200 is reasonable. The court, therefore, finds reasonable compensation for Quilling, Selander, et al. to be charged to the debtors of \$560.

The total attorney's fees to be charged the debtors is \$1,310.00. The attorneys incurred actual out-of-pocket expenses of \$38.08. The court, therefore, allows \$1,348.08 for attorney's fees and expenses as part of Item Specialities allowed claim.

The court reiterates that while Item Specialities may determine that it is prudent to request and pay for services, that does not necessarily make them reasonable, under the lodestar calculation, for charging to the debtors.

Item Specialities included \$450 for accountant's fees in the proof of claim. The note and deed of trust do not provide for accountant's fees to be paid by the debtors. Section 506(b) allows reasonable fees and costs if provided by the parties' agreement. Gott testified that he hired the accountant because

he lacked banking experience and needed an accountant to post payments and to establish an accounting method for note and wrap note payments and credits. This service constitutes a cost of doing business by Item Specialities. The fees may have been reasonable and necessary for Item Specialities to incur to perform its obligations to account for note payments by the debtors, but the costs cannot be charged to the debtors. Therefore, the portion of the claim for accountant's fees is disallowed.

Based on the foregoing,

**IT IS ORDERED** that the allowed secured claim of Item Specialities, Inc., shall include \$1,348.08 for attorney's fees and expenses, but -0- for accountant's fees.

Signed this \_\_\_\_\_ day of June, 2002.

---

Judge Steven A. Felsenthal  
United States Bankruptcy Judge



